United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-1439

Docket 75 1439
Cal. 3565

B
P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appelleee

v

JAMES E. LOFLAND,

Appellant

REPLY BRIEF FOR APPELLANT

BERNARD JAY COVEN
747 THIRD AVENUE
NEW YORK, N.Y. 10017
(212) PLAZA 8-7090

3

INDEX TO BRIEF

TABLE OF CASES CITED

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee

-against-

JAMES E. LOFLAND,

Appellant

REPLY BRIEF OF APPELLANT

STATEMENT

This is a reply brief to the brief of the Appellee. The Court is respectfully referred to the "Statement of Facts" contained in the main brief of the appellant. The Brief of the Government contains a number of inaccuracies and omissions, all highly relevant to the within appeal. Reference to such matter is contained in the respective points urged herein.

POINT I

PROSECUTORIAL MISCONDUCT WITH REFERENCE TO WITNESS RUPE REQUIRES THE GRANTING OF A NEW TRIAL

Point I of the Defendant's Main Brief sets

forth the prosecutorial misconduct of the prosecutor in pitting the veracity and integrity of the prosecution against that of the witness Rupe. The explanations of the prosecutor contained under Point I of the Government's Brief[1] are misleading, and, it is submitted totally inadequate as a matter of law. The Government seeks to give the impression that concededly inappropriate questions were limited to two on cross examination of Witness Rupe (GB p. 19) and some four additional questions on re-cross (GB20,21). The fact is as the record shows that there was a steady barrage of questions and all over repeated objections by the defense. The Government Brief states that the prosecution recognizing that the questions on cross were "inappropriate" "attempted to correct the error immediately" by putting questions such as:

> "Q. When you met with me in October, Special Agent Myers was there, right? (GB p.19)

The prosecutor then goes on to state that Agent Myers "was subsequently called on to testify to these conversations on rebuttal" (GB p.19) Nothing could be

(1) Pages of the Brief of the Government are referred to as "GB p.___"

be further from a true summary of the Record. Agent Myers, when called as a rebuttal witness, was never asked by the prosecutor if he was present at any conversation in which the witness Rupe, the prosecutor and the agent were present. As to questions as to whether a conversation was had at a time when the prosecutor, the witness Rupe, Bernice Smith and Steve Markstein were present (GB p.19), the prosecution never called any of these"witnesses". In a footnote the Government suggests that the defense should have called Markstein and Smith (GB p.23). It was not the obligation of the defense to provide a cure for the prosecution's egregious errors. The statement made by the prosecutor that he "attempted to correct the error immediately" (GB p.19) is an obvious afterthought for this appeal and unfair to be urged. The prosecutor's"testimony" continues right into his brief such as placing in brackets after Steve Markstein the phrase " a student from Fordham Law School" which is not contained in the Record (GB 19);as well as such prejudicial comments with respect to Gardner, who was not called as a witness, that he had two prior convictions " for financial frauds" and is presently under "indictment etc" (GB p.12 footnote).

As to questions directed to the witness Rupe as to whether other persons were present at the time she purportedly spoke to the prosecutor such questions were not curative. They were an unfair attempt at coercion, particularly in view that none of these persons were called to confirm such conversations, assuming arguendo, that such type testimony would be permissible. The citation to United States v Caruso, 465 F. 2d. 1369 (2nd Cir. 1972) is inapposite (GB p.26). In the Caruso case the prosecutor sought to prove that the defendant had made incriminating statements to a government attorney MacDonald who was not called as a witness. However, Secret Service Agent Angelone testified that in the presence of MacDonald the defendant had confessed to the crime charged (at p. 1372). In the instant case there was no testimony offered by the Government by anyone who was allegedly present at a conversation between the prosecutor and the witness Rupe. In Caruso the Court also noted that no objection was made by the defendant and it was apparently conceded by the defense that the questions propounded were entirely proper, at p. 1372 and footnote 4. In the instant case the defense objected strenuosly and moved for a

mistrial. The effect of naming Agent Myers, Smith and Markstein was plainly to influence the jury to accept the version of the prosecutor.

The confusion of the witness induced by the coercion of the prosecutor is well illustrated with respect to the questioning with reference to the affidavit which forms the basis for Count Eight of the indictment. The witness testified on direct that she was requested to send the letter to Mr. Cerny, an attorney (Rp.294*) but that she had not sent the affidavit but had shown it to Cerny (R p.299). She subsequently testified on direct that she had destroyed the paper (R p. 299). At a side bar conference the prosecutor offered to take the stand and testify with respect to this paper (R p.296). As is indicated below this offer was taken up eventually when the prosecutor was called as a defense witness and questioned about the affidavit. On cross examination of the witness Rupe by the prosecutor, after she had testified as a witness for the defense, the prosecution sought to read the Grand Jury testimony of the wit-

"R" refers to trial record

ness, one of which questions reread was to whether the defendant Lofland had told the witness to send the affidavit to "him" i.e., Lofland. The witness confirmed she had so testified (R p.1206). The next question was :

"Q. Did you send it to Mr. Cerny ?
A. Yes
Q. Otherwise that answer is correct?
A. Yes, sir "

A moment afterwards the witness testified that she had ripped up the affidavit (R. 1207). The prosecutor then started to spar with the witness using the question "Incidentally, this affidavit Mr. Lofland had told you to send to his attorney here in New York, Mr. Howard Cerny; is that right?" (R. p. 1208). The prosecutor put directly to the witness whether the testimony she gave to the grand jury and at this trial was true or false (R. p. 1208) The witness testified that she could not say positively whether it was the truth or an untruth and added "I told you (i.e. the prosecutor) "I had a lot of doubts". The prosecutor to save the answer twisted it as follows" a lot of doubts about Mr. Lofland?" (R. p.1209). On the defense portion of the trial the witness Rupe testified that she took the affidavit to Mr. Cerny. Cerny told her that he could not

because of a conflict of interest. The witness explained that she had given the attorney a collection matter with respect to Gardner. It was then she tore the affidavit up (R. 1161, 1162).

Similarly with respect to the issue as to whether the witness Rupe was in physical fear of the defendant the prosecutor squarely put the integrity of his office and himself on the line. The statement by the prosecutor that his m ention as to whether agent Myers was present at such conversations between himself and the witness was enough to cure the error (R. p. 22) is incredulous. The record plainly indicates that when called as a rebuttal witness agent Myers was never asked whether he was present at any conversation between the prosecutor and the witness and he did not confirm in the remotest manner the conversations which the prosecutor asserted in his questioning was had between himself and the witness.

When the prosecutor was called by the defense the defense heeded the warning of the Judge that the defense could not set up an appealable point by putting the prosecutor's integrity on the line with respect to the ~~line~~ issue of objected to questioning on cross and recross of the witness Rupe. (R. p. 1215). The defense

pursued another line of which appeared to be prosecutorial misconduct. Referring to the questions set forth on page 6 of this Brief, the prosecutor was asked with respect to the affidavit:

> "Q. Do you recall asking [Rupe] a few moments ago whether she mailed it to Mr. Cerny?
> A. Yes." (R.p. 1217)

The next moment the witness sought to change his answer and was permitted to do so by the Court. He testified

> " I didn't ask her whether she mailed it. I asked her whether she had told Lofland that she had mailed it " (R p. 1218)

The Record, of course was otherwise. The defense then sought unsucessfully, unable to surmount the prosecutor's objections, that at the time he had put the questions to witness Rupe, quoted above, he was then in knowledge that Rupe had brought the paper to Cerny's office and had shown it to him. This supported the witness's testimony that she had torn the affidavit up by reason of Cerny telling her that he could not accept the same by reason of a conflict of interest, and therefor the paper had no further value, not that it was destroyed for reasons that it was false.

POINT II

THE DEFENDANT WAS PREJUDICED BY THE ADMISSION OF ACTS OUTSIDE OF THE INDICTMENT WHICH WERE WHICH WERE NEITHER SIMILAR OR CRIMINAL

THE COURT IN ANY EVENT FAILED TO WEIGH PROBATIVE VALUE AGAINST THE OVERWHELMING HOSTILITY ENGEDERED BY THE EVIDENCE OF OTHER ALLEGED PRIOR SIMILAR CRIMINAL ACTS

The main brief of the defendant "Point IV" sets forth the contention that the overwhelming portion of the trial was taken up with matters not charged in the Indictment, particularly with respect to Counts one to four and six (mail and wire fraud). The Government disputes this citing its proof consisted of "four similar acts of fraud" (GB p.39). It cites these four as dealing with Vane Higgins, Dennison, Goodman and a prior conviction (GB p. 39, 40).

Dennison

The Dennison testimony, contrary to the statement contained in the brief of the Government (GB 40) was not a prior similar criminal act. Dennison loaned the defendant $13,500 and for the making of the loan was given an interest in a lease.(R. 812-22). There is no proof in the trial record that this was "one of

of the very same mineral leases in Lea County, New Mexico, to the fraudulent sale of which he (defendant) had previously pled guilty" (GB 40). In the first instance and contrary to the statement in the Government brief Dennison was not given a lease for security in the event she was not repaid. She was given an interest in a lease for the making of the loan (R. page 821 line 23) and further it was an oil lease and not a mineral lease that she was given (R. 821). The act was neither similar or criminal.

Vane Higgins

This gentleman testified that he did some work on the Coranado Country Club. He testified that that there was owing to him $2,000. That the monies were paid to him but not before two checks for the amount were returned insufficient funds. He testified that he needed funds and had advanced some $21,000 to persons (other than the defendant) as an advance payment to such third persons promising funding. He later learned that Lofland had received $14,000 from one of these third persons, cashing the check which the witness had paid. This act on the part of the defendant was neither similar to that charged in the indictment nor proven criminal.

Batie

One, Eugene Batie surfaces in the brief of the Government as a "victim" as that term is defined by the indictment (GB 8). The fact is that Mr. Batie was not a "victim" or the subject of a "prior similar criminal act", as to the latter the Government makes no claim with respect to him. Mr. Batie was a farmer who bought land relatively cheaply and sought to sell at an extraordinarily high price to the defendant. He bought the property for $87,500 and sought to sell it for $192,500 (R. p. 539). He entered into a contract with the defendant which required a down payment of $15,000 which money he received. The defendant was unable to raise the funds for a closing, some $65,000. The witness eventually lost the property on foreclosure, and claimed a loss for his expenses in preparing the title for the sale i.e., clearing liens and for the fact that the property on foreclosure was sold for about twenty five persent of the contract price. This testimony was irrelevant and prejudicial. The witness was obviously not a "victim" on any broad stretching of the matters related in the Indictment. A motion to strike the testimony was not responded to by the Trial Judge (R.p.531)

Cole

Absent from the Brief of the Government is there any mention of this witness, David Cole. This witness was employed by Arnholz Coffee Company as a credit manager. Arnholz supplied certain equipment to the Coronado Country Club. He testified that had equipment installed after he learned that there was a tax lien against the defendant in the sum of $265,000. He testified that after the equipment had been installed the defendant told him that National Leasing System was in the process of buying (sic) his equipment and that he would then be able to pay Arnholz. This leasing did not materialize. (R. pp 437-439). It is submitted that the testimony of this witness was not admissible as a prior similar criminal act and that the reference to a tax lien of $265,000 was prejudicial.

Dooley

Bert V. Dooley was called as a witness for the Government (R p. 823). Mr. Dooley was an accountant and had prepared a statement for Lofland and had given the statement to Lofland. (Govt. Exh.148). Through this witness the Government"showed" that Lofland owed the Government $219,000 which was not

told to him by Lofland, and that Lofland had not told him that he, Lofland, owed the Crocker Citizens Bank in California "in excess of $35,000" (R. p.825). This witness was not connected with the case and the fact that he had made up a statement for Lofland and had given it to Lofland was likewise irrelevant. The witness was used to chacterize the defendant as a bad person and the manner of questioning e.g. as to whether the witness knew that the defendant owed the United States Government $219,000 conveyed to the Jury a personal knowledge of the prosecutor. In the questioning of witness Rupe on the Government's direct case the Government attempted to prove that Lofland had never shown the witness this financial statement (Exhibit 148)! By Mr. Rakoff: "We want to establish she wasn't shown this" (R.p.385) The defendant was damned if he did not show what the Government claims was a false financial statement to witness Rupe and was to be damned if he had done so.

POINT III

THE STRIKING OF A PORTION OF COUNT EIGHT BROADENED THE CHARGE THE DEFENDANT

The defendant in his main brief alleges error

in the failure of the trial Judge to dismiss Count Eight and in the striking of a portion therefrom. The prosecution argues that the striking of a portion of the count narrowed the charges against the defendant.(GB p.33). The portion striken contained in effect the thrust of the Government's contention and the basis for the obstruction indictment contained in this Count. When the specificity was removed by the striking of a portion of the Count, the prosecution was in effect given a blank check to fill in as they willed and the trial Jury was permitted wide speculation as to what conduct would fit the broad remaining allegations of the Count. The Court's charge on this Count was broad and gave the jury no assistance (Appendix to Deft. Main Brief p.59a-62a).

CONCLUSION

THE JUDGMENT OF CONVICTION SHOULD BE REVERSED AND A NEW TRIAL ORDERED

Respectfully submitted

BERNARD J. COVEN
Attorney for Defendant
Appellant